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No. 82-527

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HARDLINE ELECTRIC, INC., *Petitioner,*

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1547, *Respondent.*

REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

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I. THE UNION HAS FAILED TO EFFECTIVELY REBUT HARDLINE'S ARGUMENT THAT THE NINTH CIRCUIT SIGNIFICANTLY DISTORTED THE HOLDING OF REPUBLIC STEEL, AND THAT SUCH DISTORTION WILL HAVE FAR-REACHING CONSEQUENCES UNLESS CORRECTED BY THIS COURT.

The union does not even attempt to dispute Hardline's point that Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965), repeatedly cited by the Ninth Circuit in its opinion in this case, has no application whatsoever to this case. Republic Steel dealt with the duty of an individual union member, and not an employer such as Hardline, to use the contractual grievance procedure agreed upon by its union. Since Republic Steel is inapplicable, it does not support the union's argument that Hardline must exhaust

its contractual remedies before seeking damages under 29 U.S.C. § 185, and the union has failed to cite any authority which does support that proposition. The union has also failed to address Hardline's point that the notion that the employer must initiate arbitration, even if not requested to arbitrate, is fundamentally inconsistent with the doctrine that the union can waive its right to arbitration.*

The union compares the present case to Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionery Workers,

*The union's citation to that portion of the decision in which the Ninth Circuit acknowledged that the right to arbitration may be waived only underscores the Ninth Circuit's error in this case. In California Trucking Ass'n v. Brotherhood of Teamsters, 679 F.2d 1275 (9th Cir. 1981), cited in this opinion, the court held that the union waived its right to arbitration when it failed to timely raise the issue. The fact that the Ninth Circuit did not find a waiver in this case, where the union never raised the issue of arbitration, clearly demonstrates the Ninth Circuit's inconsistency and error.

370 U.S. 254 (1962), in which this court granted the union's motion for stay of the employer's court action for damages pending arbitration of the dispute. However, the critical difference between this case and Drake Bakeries is that here the union never requested arbitration. Drake Bakeries supports Hardline's position because it makes clear that if the union does not timely request arbitration, its right to arbitration is waived.

The union argues that Hardline's petition for certiorari should not be granted because the Ninth Circuit did not rely upon Republic Steel in dismissing Headline's suit. However, it is clear that the Ninth Circuit relied heavily upon Republic Steel. See Petition App. A-11, 14, 23. Accordingly, this court should grant Hardline's petition for certiorari in order to prevent the Ninth Circuit's erroneous distortion of Republic Steel from

having the far-reaching precedential effect which it otherwise would have.

II. THE UNION HAS FAILED TO EFFECTIVELY REBUT HARDLINE'S ARGUMENT THAT THE NINTH CIRCUIT SIGNIFICANTLY DISTORTED THE HOLDING OF BOYS MARKETS, AND THAT SUCH DISTORTION WILL HAVE FAR-REACHING CONSEQUENCES UNLESS CORRECTED BY THIS COURT.

The union has not disputed Hardline's basic contention, which is supported by ample authority at pages 10-12 of Hardline's petition, that an employer need only arbitrate an arbitrable dispute if requested to do so.* It is undisputed that the union never requested arbitration of

*The union's argument that arbitration is the preferred method of dispute resolution is simply not relevant to a case such as this one where neither party ever requested arbitration.

the dispute in this case, and therefore, Hardline was not obligated to arbitrate the matter.

The fact that an employer may have earlier obtained a Boys Markets injunction has no effect on this principle and the union has failed to cite any authority to the contrary. Boys Markets, Inc. v. Retail Clerks Union, Local 7710, 398 U.S. 235 (1970) merely holds that prerequisites of a proper injunction are that the dispute is arbitrable and that the employer is willing to arbitrate the matter. There is no requirement that the dispute actually be arbitrated subsequent to the issuance of the injunction.

The union claims that this court should not grant Hardline's petition for certiorari because the Ninth Circuit's decision does not establish a far-reaching, absolute rule to the effect that any employer who obtains a Boys Markets

injunction must exhaust the arbitration procedure provided for in the collective bargaining agreement before seeking damages in court under 29 U.S.C. § 185. Opposition Brief at 6. However, that is precisely the rule enunciated by the Ninth Circuit, and for the first time by any court, in the present case.

In dismissing Hardline's suit for damages, the Ninth Circuit expressly stated its rationale as follows: "Hardline sought and obtained an [Boys Markets] injunction against the Union's alleged strike activity on the basis the dispute was arbitrable." Petition App. A-15. Therefore, the decision clearly stands for the proposition that any employer who obtains a Boys Markets injunction must exhaust remedies under the collective bargaining agreement before seeking damages under 29 U.S.C. § 185. Although the union denies that the result in Hardline will be applied to other

employers obtaining Boys Markets injunctions, the language and reasoning of the opinion are to the contrary and the union can cite no reason why the decision would not have a far-reaching and precedential effect on all such employers.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

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December 16, 1982